No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Bill of Complaint

DUKE ENERGY CAROLINAS, LLC'S MOTION AND BRIEF IN SUPPORT OF MOTION TO INTERVENE AND FILE ANSWER, AND ANSWER

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ANSWER

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On October 1, 2007, this Court granted South Carolina's motion for leave to file a bill of complaint against North Carolina. The action seeks an equitable apportionment of the Catawba River, and a decree enjoining North Carolina's "transfers of water from the Catawba River, past or future, inconsistent with that apportionment." Compl. 10, Prayer for Relief. Pursuant to Supreme Court Rule 17, Duke Energy Carolinas, LLC ("Duke") seeks leave to intervene.

The reasons for Duke's motion are fully set forth in the accompanying memorandum. Briefly, Duke has unique, substantial public and private interests in the flow of the Catawba River in both North and South Carolina that are not represented by either State and that are integrally related to the River's equitable apportionment. For decades, acting prior to

and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), Duke and its predecessor companies have impounded water from the Catawba in 11 reservoirs located in both States to provide hydroelectric power to the region. The terms of Duke's current and future FERC licenses, Duke's interests in the Catawba waters, and the public interests protected by Duke's FERC License under the Federal Power Act are directly implicated in any equitable apportionment.

With reservoirs and facilities located in *both* Carolinas and a FERC License requiring Duke to serve the public interest, Duke's interests are not adequately protected by either State. And, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the door to general intervention.

WHEREFORE, Duke respectfully requests that its motion to intervene be granted.

Respectfully submitted.

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On October 1, 2007, this Court granted South Carolina's motion for leave to file a bill of complaint against North Carolina. The action seeks an equitable apportionment of the Catawba River, and a decree enjoining North Carolina's "transfers of water from the Catawba River, past or future, inconsistent with that apportionment." Compl. 10, Prayer for Relief. Pursuant to Supreme Court Rule 17, Duke Energy Carolinas, LLC ("Duke") seeks leave to intervene to protect its unique, substantial public and private interests in the flow of the Catawba River in both North and South Carolina – interests that are not represented by either State and that are integrally related to the River's equitable apportionment. Indeed, because of its interests and experience, Duke can substantially assist the Court and any Special Master in evaluating the complex

issues posed by this case.[1] See *Arizona* v. *California*, 460 U.S. 605, 614-15 (1983).

For decades, acting prior to and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), see *Duke Power Co.*, 20 F.P.C. 360 (1958) (order issuing license), Duke and its predecessor companies have impounded water from the Catawba in 11 reservoirs located in both States to provide hydroelectric power to the region. SC App. 14. Both the impounding of water in the reservoirs and the releases of that impounded water play a substantial role in determining the flow of the Catawba River. For example, under its current FERC License, Duke is required to release water to maintain specific flow rates for fishery and other purposes. And, with its application for a new license, Duke has submitted a Comprehensive Relicensing Agreement, negotiated by 70 parties including agencies of North and South Carolina. That Agreement requires Duke, *inter alia*, to maintain significantly increased flow rates during times of normal rainfall and times of drought.

The terms of Duke's current and future FERC licenses are of critical importance to this Court's decision whether and how to equitably apportion the Catawba River. The aim of equitable apportionment is to achieve a just and equitable result through a balancing of costs and benefits. Existing uses of water such as those by Duke and the businesses and

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[1] This Court's Rules indicate that the Federal Rules of Civil Procedure are "guides" to the procedures used in actions within its original jurisdiction. Sup. Ct. R. 17.2. With respect to Fed. R. Civ. P. 24 this Court has made clear that its cases addressing intervention govern, rather than the general jurisprudence interpreting Rule 24. *See Arizona* v. *California*, 460 U.S. 605, 614-15 (1983).

communities dependent on Duke's facilities and operations will play a substantial role in any apportionment analysis. See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982) ("the equities supporting the protection of existing economies will usually be compelling"). In addition, the public interests recognized by federal law and protected by Duke's FERC License under the Federal Power Act ("FPA") are directly implicated in any equitable apportionment. See 16 U.S.C. §§ 797(e), 803(a)(1), 808(a). Finally, as an impounder of water, Duke has state-law rights to the excess water obtained by virtue of the impoundment – rights that might be directly affected by an equitable apportionment that requires releases from Duke's reservoirs. See N.C. Gen. Stat. § 143-215.44(a).

With reservoirs and facilities located in *both* Carolinas, Duke's interests are not adequately protected by either State's interest in obtaining a larger portion of the Catawba. Nor are Duke's interests wholly private; by virtue of its FERC License, Duke serves numerous public interests protected by federal law as well as its own interests. Indeed, Duke currently has a strong and unique interest in defending the lawfulness of the conditions set forth in the Comprehensive Relicensing Agreement negotiated among 70 stakeholders in the Catawba River basin to support Duke's application for a new 50-year FERC License. Finally, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the door to intervention by any citizen who asserts merely an economic interest in the Catawba. For these reasons, Duke respectfully requests that its motion to intervene be granted.

STATEMENT

1. Duke will not repeat the Statements of North and South Carolina that set forth in detail the importance and historic development of the Catawba River basin in both States, and the origins of this original action. Instead, this Statement will provide only the background essential to Duke's motion to intervene.

Commencing in the early 20th century, Duke's predecessor, which later became known as Duke Power Company, was founded to provide electric power in the Piedmont region. In 1958, the Federal Power Commission issued to Duke Power Company a 50-year license under Section 4(e) of the Federal Power Act "for the construction, operation and maintenance" of hydroelectric facilities along the Catawba River in North and South Carolina that constitute Project No. 2232 ("the Project"). The License was expressly made "subject to the terms and conditions of the Act" and "to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act." 20 F.P.C. at 368. The License also required Duke to maintain and grant passage over Duke property to permit public access to each lake created by the Project, *id.* at 370-71. Finally, the License required Duke to make certain minimum water releases at each development in North and South Carolina, as set out in the License, for purposes specified and in consultation with relevant State agencies. *Id.* at 371-72. (For example, the required minimum average daily flow from Wylie dam, releasing water into South Carolina, is 411 cubic feet per second ("cfs"). NC App. 58a.) Duke's License is due to expire in 2008.

Duke has operated under this FERC License for almost 50 years. As noted above, today Duke has 11 reservoirs along the Catawba, six in North Carolina, four in South Carolina, and one at Lake Wylie on the border between the two States. The reservoirs allow Duke both to generate hydroelectric power at 13 hydroelectric generating plants and to supply cooling water for its nuclear power and coal-fired plants in the Catawba basin. Duke's hydroelectric plants effectively control the flow of the Catawba River; more specifically, the reservoir at Lake Wylie is the source of the Catawba water that flows into South Carolina. NC App. 4a-5a.

In February 2003, Duke began preparations for applying to FERC for the relicensing of its Project. As North Carolina's brief and declarations explain, Duke sought to include all relevant state and private parties to create a consensus around the terms for obtaining its new license. See NC Br. 2-3. Three years of negotiations eventually led to the 2006 Comprehensive Relicensing Agreement ("CRA") signed by Duke, its corporate parent, and 68 other entities, including the North Carolina Department of Environment and Natural Resources, the South Carolina Department of Natural Resources, other state agencies, public water suppliers, county and municipal governments from both States, industries, interest groups, and individuals. See *id.* at 3. The CRA is a formal request to FERC to grant Duke's new License under the terms and conditions set forth in that Agreement. *Id.*; see also NC App. 6a, 57a-58a.

It was time-consuming, expensive, and difficult for all stakeholders in the Catawba River basin to reach agreement on the terms for FERC's issuance of Duke's new License – a license that Duke must obtain in order to continue to conduct its operations

under the FPA. And, many of the provisions of that new License involve factors that, as explained below, are directly relevant to the equitable-apportionment analysis. For example, the CRA would establish the minimum daily flow from Lake Wylie in a variety of settings, from no drought (1,100 cfs) through Stage 1 (860 cfs), Stage 2 (720 cfs), and Stages 3 and 4 (700 cfs) drought conditions. NC Br. 3-4; NC App. 57a-58a, 7a. This would represent a significant increase from the 411 cfs minimum average daily flow required under the current License for fishery and other purposes.

The CRA also establishes a Low Inflow Protocol ("LIP") for entities that use or withdraw water from the Catawba. See NC App. 6a-7a, 58a. The protocol requires certain entities to take increasingly stringent conservation measures as drought conditions become more severe. *Id.*

Duke filed its license application with FERC on August 29, 2006. FERC has not yet ruled on that application. See NC App. 12a, 60a. A ruling is scheduled to be issued before expiration of the current License in August 2008, but may occur some time thereafter. FERC strongly encourages stakeholder settlements such as this CRA, because it allows the parties who represent the interests that FERC must address to recommend a negotiated balance of all relevant interests. If the application for a license is accepted and the terms of the new License go into effect, the issues of equitable apportionment confronting this Court and any Special Master will have to be addressed in the context of the new License's minimum daily flow and other requirements.

Numerous businesses and communities in the Catawba basin now rely on the River and on Duke's

hydroelectric facilities and other operations. All parties agree that the Catawba, including the power generated by Duke's facilities, is critical to the economies and communities of the basin now and for the foreseeable future. All parties further agree that the region has been periodically subject to drought, with damaging consequences for the Catawba's flow. These considerations were crucial in the multi-party negotiations that led to the CRA and its LIP submitted to FERC by Duke. The same considerations will be central to the equitable-apportionment analysis.

2. Although North and South Carolina have long worked out their differences concerning the Catawba River, the severe drought that occurred from 1998 through 2002, and subsequent drought conditions, led to the initiation of this lawsuit. Both North and South Carolina have statutes that permit state agencies to authorize transfers of water from one river basin to another. See N.C. Gen. Stat. § 143-215.22I; S.C. Code Ann. §§ 49-21-10 to -80. North Carolina, through its Environmental Management Commission ("EMC"), has utilized its authority under its Interbasin Transfer Statute to approve transfers of water from the Catawba River to other river basins.

Recently, on January 10, 2007, the EMC granted in part an application for a transfer of water from the Catawba over the objection of South Carolina. SC Br. 7. As detailed in the party States' briefs, this grant led to certain communications between the States, but did not result in negotiations or any other resolution of the disagreement about the Catawba water transfers. On June 8, 2007, South Carolina filed its motion for leave to file the bill of complaint in this case.

In its complaint, South Carolina seeks an equitable apportionment of the flow of the Catawba River and, relatedly, a declaration that North Carolina's transfers of water from the Catawba to other watersheds are unlawful to the extent that they exceed North Carolina's equitably apportioned share, and an injunction prohibiting such transfers. South Carolina is not challenging the lawfulness of North Carolina's Interbasin Transfer Statute *per se*; it is challenging that law only to the extent it is utilized to authorize transfers that result in North Carolina's use of water in excess of its (as yet undetermined) equitably apportioned share of the flows of the Catawba River. Compl. ¶ 4.

This Court granted South Carolina's motion on October 1, 2007. Duke is filing this motion and its proposed answer to the Bill of Complaint within the time that this Court has set for North Carolina to file its answer. Duke seeks to intervene pursuant to Supreme Court Rule 17 because any equitable apportionment of the Catawba River will directly address Duke's current and future uses of the River pursuant to its FERC License, and will directly affect Duke's legal rights and obligations in connection with the waters of that River.

ARGUMENT

INTERVENTION IS WARRANTED BECAUSE DUKE'S UNIQUE INTERESTS IN THE CATAWBA RIVER ARE NOT REPRESENTED BY THE PARTY STATES AND WILL BE DIRECTLY AFFECTED BY ANY EQUITABLE APPORTIONMENT.

This Court has recognized that in specified circumstances, parties other than states and the

United States have a "compelling interest" that is not represented by a party state, and thus should be permitted to intervene in original cases that will directly affect that interest. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). This case presents precisely those circumstances. Based on its federally-licensed activities in both States, Duke has a unique amalgam of rights and obligations arising out of the water of the Catawba River that are not adequately represented by either State, and that implicate substantial federal, public and state law interests. These interests would be directly affected by any equitable apportionment of the Catawba River.

A. Duke's Interests Would Be Directly And Materially Affected By Any Equitable Apportionment Of The Catawba River.

In addressing equitable apportionment, this Court applies federal common law. See *Virginia* v. *Maryland*, 540 U.S. 56, 74 n.9 (2003). This Court will make "an informed judgment on consideration of many factors." *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). This Court's oft-quoted enumeration of apportionment principles provides a sense of the complexity of the inquiry:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors .... [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant

> factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. [*Id.*]

Duke's pervasive presence on the River now and for more than 100 years – its facilities, operations and water use – will play a central role in virtually every factor of the equitable apportionment inquiry. Its current and new FERC License will color any assessment of the relative benefits and costs of Duke's water control and usage at multiple locations on the River in order to serve the businesses and communities dependent upon Duke's operations. Duke's public and private interests, in general and at numerous individual locations in both States, are potentially affected by the outcome of any equitable apportionment, and many of the facts relevant to the inquiry involve Duke's present and future uses. These considerations alone warrant intervention.

Finally, although the Court interprets and creates federal common law in apportionment cases, state law does provide a source for principles that the Court uses to craft that common law. See, *e.g.*, *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (Court's equitable apportionment is based in part "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). Under North Carolina law, Duke, as an impounder of water, has "a right of withdrawal of excess volume of water attributable to the impoundment." N.C. Gen. Stat. § 143-215.44(a). That right, too, is potentially affected by an equitable apportionment that requires Duke to release excess impounded water. That is a substantial interest unique to Duke that makes intervention particularly appropriate.

In sum, Duke has numerous rights and obligations that will be directly affected by any equitable apportionment of the Catawba. In addition, Duke is uniquely situated to assist the party States and the Court's exploration of all facts relevant to deciding what should be an equitable apportionment.

B. These Interests Strongly Support Intervention.

Duke's legal rights and responsibilities and its real-world role in the Catawba River basin demonstrate its "compelling interest[s]" in this original action, and militate strongly in favor of allowing its intervention under this Court's precedent.

Most notably, in *Arizona* v. *California*, 460 U.S. 605 (1983), this Court permitted Indian tribes to intervene in an original action concerning water rights in the Colorado River basin, even though the United States was already litigating on their behalf. *Id.* at 615. This Court observed that:

> The Tribes . . . ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. . . . .
>
> . . . The Tribes' interests in the waters of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. [*Id.* at 614-15.]

Like the intervenor tribes, Duke has rights and obligations in the waters of the Catawba; those rights are conferred by the FERC License, by prior use and by state law, all of which are implicated in the equitable apportionment of the Catawba's waters between North and South Carolina. Indeed, the case for intervention is even stronger here than in *Arizona*

v. *California*. While the tribes' interests were protected by the United States, neither State purports to speak for Duke's interests, which are reflected in its FERC License, its established uses, and its common law and state law rights to certain impounded waters. Compare *Arizona* v. *California*, 530 U.S. 392, 419 n.6 (2000) (denying intervention by lessors of reservation lands because the putative intervenors did not own land or claim water rights in the Indian reservation at issue).[2]

Other instances where this Court has permitted intervention also strongly support granting Duke's motion. In *Maryland* v. *Louisiana*, 451 U.S. 725, 734 (1981), eight states filed an original action against Louisiana, asserting that a tax that it imposed on natural gas brought into the State was invalid. The Court allowed 17 natural gas pipeline companies subject to the tax to intervene, explaining:

> Given that the Tax is directly imposed on the owner of imported gas and that pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exploration of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of

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[2] As the Court in *Arizona* v. *California* also recognized, when the participation of a private party in an original action does not "enlarge[ ] [the claim of one state against another, there is no Eleventh Amendment bar to the intervention. *See* 460 U.S. at 614. Duke does not seek to bring any separate claim against either State; it seeks simply to represent its own interests in connection with the equitable apportionment claims already made by South Carolina.

private parties in original actions. [*Id.* at 745 n.21.][3]

Thus, this Court allowed intervention even though either of the states challenging the tax might have acted as *parens patriae* and might have represented the pipelines' interests. The critical point appears to have been that the incidence of the tax fell directly on the pipelines, making their interest more compelling than that of any average citizen of an affected state and making their expertise and knowledge valuable to the "exploration" of the issues. The same is true here. For over 100 years, Duke has maintained reservoirs and hydroelectric plants along the Catawba River in both Carolinas, operating under a federal license for nearly 50 years; an equitable apportionment of those waters directly implicates Duke's interests and will require an understanding of extant and future uses, including, critically, Duke's use of the waters under its FERC License.

C. None Of The Usual Bases For Denying Intervention Applies Here.

Duke recognizes that this Court exercises care in authorizing private parties to intervene in original actions. But the reasons for the Court's usual caution are not applicable here. As noted, neither individual State acts as *parens patriae* to Duke. See *New Jersey* v. *New York*, 345 U.S. at 372 (denying Philadelphia's motion to intervene because its interests were already represented by Pennsylvania which was a party); see also *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995). Although a sovereign is generally presumed to represent the interests of all its citizens,

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[3] *See also Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (granting intervention to private parties whose lands were directly affected by a boundary dispute)

Duke has facilities and interests in both North and South Carolina as well as a federal license that implicates the public interest in both States. Neither State will represent Duke's particular amalgam of federal, state and private interests. Yet Duke's fundamental interests are directly at stake in this litigation.

This Court has also been concerned that the intervention of one entity with an interest in the matter subject to original jurisdiction might open the floodgates to numerous similarly-situated entities. See *Utah* v. *United States*, 394 U.S. 89, 95-96 (1969) (per curiam). Duke's particular interests – arising from its FERC License and the associated federal and public interests, its presence in both States, and its unique role as impounder of substantial quantities of water in both States – ensure that there is no one similarly situated or with comparable interests. And, if the Court were to allow other intervenors, Duke is committed to coordinating with them to reduce any increased litigation burden resulting from the participation of private parties. Duke respectfully submits, however, that the level of illumination it can provide with respect to the facts relevant to equitable apportionment is a benefit that outweighs any incremental burden to the Court from its participation.

Finally, nothing has yet been resolved in this case. Thus, Duke's intervention will not delay the matter or require re-litigation of any issue already decided. See *Arizona* v. *California*, 460 U.S. at 615.

CONCLUSION

For the foregoing reasons, the motion to intervene should be granted.

Respectfully submitted,

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ANSWER

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ANSWER

Duke Energy Carolinas, LLC ("Duke") files the following answer to the Complaint filed by the State of South Carolina:

1. Admitted.

2. Admitted that the Catawba River is essential as set forth in the first sentence of this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

3. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

4. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

5. Admitted.

6. This paragraph states a legal conclusion that Duke is not required to admit or deny.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

13. Duke lacks sufficient knowledge to admit or deny the allegations in this paragraph.

14. Admitted that a multi-stakeholder negotiation process occurred involving Duke and groups from North and South Carolina, and that the negotiations resulted in an agreement about the minimum continuous flow into South Carolina from the Catawba River. Denied that the Federal Energy Regulatory Commission was a stakeholder in this process. Denied that 1,100 cubic feet per second was agreed to be the minimum continuous flow that South Carolina should receive. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

15. Admitted that the Appendix documents cited support the factual allegations set forth in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

16. Admitted that Duke has developed a model to estimate the flow of the Catawba River. Duke denies the characterizations of the model and what it shows on the ground that they are incomplete.

17. Admitted that the Catawba River has been subjected to prolonged droughts. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

18. Admitted that North Carolina enacted an interbasin transfer statute in 1991. That statute has since been repealed and a different one adopted. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

19. Denied. The statute referred to has been repealed and a new interbasin transfer statute has been enacted. Duke states that both the statute described in this paragraph and the new statute speak for themselves, and therefore that Duke is not required to admit or deny the allegations in this paragraph.

20. Admitted that the North Carolina EMC granted the permits described in this paragraph. Duke lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph.

21. Duke states that the first sentence of this paragraph states a legal conclusion that Duke is not required to admit or deny. Duke lacks sufficient knowledge to admit or deny the remaining allegations in this paragraph.

22. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

23. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

24. Duke lacks sufficient knowledge to admit or deny the allegations of this paragraph.

25. Duke states that this paragraph states a legal conclusion that Duke is not required to admit or deny.

26. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

27. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the allegations in this paragraph.

28. Admitted that the application for a transfer was granted in part. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

29. Admitted that the EMC did not act as recommended in the resolution described. Duke states that the documents described in this paragraph speak for themselves and therefore that Duke is not required to admit or deny the remaining allegations in this paragraph.

FIRST AFFIRMATIVE DEFENSE

Duke's current FERC License, application for New License, Comprehensive Relicensing Agreement, which is a part of Duke's application, and the New License to be issued, including their terms involving minimum flow requirements, and other interests governed by the Federal Power Act must be given significant weight in equitably apportioning the waters of the Catawba River between North and South Carolina.

WHEREFORE, Duke prays:

1. That its interests, including the interests arising out of and related to the FERC License, be protected by any decree of this Court equitably apportioning the Catawba River;

2. That this Court's equitable apportionment of the Catawba River protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted.

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